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IN THE

# Supreme Court of the United States

**October Term, 1963**

**No. 462**

JAMES W. RALPH,

*Respondent,*

vs.

HARRY ZUBIK COMPANY, INC.,

*Petitioner*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| Counter Statement of Questions Presented for Review | 1 |
| Counter Statement of the Case | 2 |
| Argument and Reasons Why the Writ Should Be Refused | 3 |
| POINT I. Was the petitioner denied due process by the District Court's refusal to permit the introduction of certain evidence which was offered for the purpose of attacking credibility, which evidence was available to and known by petitioner but not raised in the Pre-Trial Procedure? | 3 |
| POINT II. Was the petitioner denied due process by the District Court's charge to the jury which reviewed the evidence and presented it in practical conformity with the manner in which it had been heard by the jury? | 5 |
| Conclusion | 6 |
| Certificate of Service | 7 |


## TABLE OF CASES


| | |
|---|---|
| Ambrose v. Norfolk Dredging Company, 284 F. 2nd 802 (C. A. 4, 1960) | 5 |
| Jamison v. Hawkins, 13 Pa. Superior Ct. 372, 375 (1900) | 5 |


## RULE


| | |
|---|---|
| Rule 5 II (G) | 4 |

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Respondent, James W. Ralph, opposes the Petition for Writ of Certiorari and herein presents arguments in opposition.

### Counter Statement of Questions Presented for Review.

I. Was the petitioner denied due process by the District Court's refusal to permit the introduction of certain evidence which was offered for the purpose of attacking credibility, which evidence was available to and known by petitioner but not raised in the Pre-Trial Procedure?

II. Was the petitioner denied due process by the District Court's charge to the jury which reviewed the evidence and presented it in practical conformity with the manner in which it had been heard by the jury?

## Counter Statement of the Case.

The statement of the case presented by petitioner is accepted with the following supplements and additions.

At the trial in the District Court, James W. Ralph testified that the captain of the vessel suddenly backed the vessel without warning while he was operating a capstan on the M. V. Prosperity, thereby causing the line around the capstan to tighten suddenly and the cog on the capstan did not hold, whereupon the capstan handle flew back and struck him on the arm.

Ralph testified that, after he was injured, he examined the teeth on the cog of the capstan (Appendix for the use of the Circuit Court of Appeals, 27a and 41a). Counsel for petitioner sought to offer drawings, apparati and testimony of persons which were not listed by petitioner in the Pre-Trial Procedure, obstensibly to attack the credibility of Ralph concerning whether or not it was possible to *see* the teeth of the cog on the capstan.

The District Court charged the jury in a completely unbiased manner and fairly covered the law and the evidence in much the same manner as the jury had heard the testimony.

The jury rendered a verdict in favor of James W. Ralph in the amount of $22,000, wherein the jury specifically found that the vessel was seaworthy but that the captain

had been negligent. The motion for new trial presented on behalf of petitioner was refused by the District Court and the judgment was affirmed by the United States Court of Appeals.

## ARGUMENT AND REASONS WHY THE WRIT SHOULD BE REFUSED.

### POINT I

**Was the petitioner denied due process by the District Court's refusal to permit the introduction of certain evidence which was offered for the purpose of attacking credibility, which evidence was available to and known by petitioner but not raised in the Pre-Trial Procedure?**

During the trial, Seaman Ralph testified as to the method of operating the capstan which he was working at the time of the injury. He also testified that the capstan was defective in that the "teeth" in the mechanism were worn (Appendix for the use of the Circuit Court of Appeals, 27a and 41a). Petitioner sought to call as a witness Mr. Howard Kirchner, President of the American Machine and Engineering Company, to testify with respect to the construction and operation of the capstan and also sought to have the entire vessel or the capstan produced as an exhibit. Mr. Kirchner was not listed as a witness by petitioner nor were the vessel and capstan listed as exhibits in the Pre-Trial Procedure. Petitioner had notice that the operation of the capstan would be an issue since the respondent stated in the Pre-Trial Procedure that "the cog on the capstan slipped" (Appendix for the use of the Circuit Court of Appeals, 7a) when the captain backed the

vessel without warning, causing the handle of the capstan to strike Seaman Ralph's arm.

As a matter of fact, petitioner did have an effective witness in Harry Zubik, President of the petitioner, who had about thirty years' experience on river boats (Appendix for the use of the Circuit Court of Appeals, 165a). Mr. Zubik testified fully on the construction and operation of the capstan (Appendix for the use of the Circuit Court of Appeals, 169a to 179a).

The petitioner was not denied any right by the refusal of the District Court to permit the introduction of evidence and testimony which was merely repetitive of the testimony adduced through the witness Zubik, particularly where the excluded testimony and evidence were not properly raised in the Pre-Trial Procedure and, if admitted, would have come as a complete surprise to respondent, who would have been afforded no opportunity to proceed with discovery in order to determine the competency and veracity thereof. The offer was properly rejected by the District Court in accordance with local Rule 5 II (G), which states:

> "(G. Failure to make a full disclosure of the evidence during the Pretrial Conference will result in the exclusion of that evidence at that trial. The only exceptions will be (1) matters which the court determines were not discoverable at the time of the pretrial conference, (2) impeaching matter and (3) privileged matter. Insofar as the impeaching or privileged matter is known at the time of the pretrial it must be disclosed to the court alone, for determination by the court as to the requirement of disclosure."

At any rate, this particular matter is purely academic, since the jury specifically found that the vessel was seaworthy and apparently rejected Ralph's testimony as to

possible defects in the capstan. The recorded basis for the jury's verdict was the negligence of the captain of the vessel.

In *Ambrose v. Norfolk Dredging Company*, 284 F. 2nd 802 (C. A. 4, 1960), the Court upheld, on the ground of harmless error, the refusal to permit a seaman in a personal injury action to testify as to a doctor's statement in order to rebut a charge of malingering, where defendant was found not liable. In the same sense here, even if the exclusion by the District Court were in error, it was not prejudicial to petitioner in any way, since the jury found the vessel seaworthy. The offered testimony and evidence, as to the construction and operation of the capstan, could have achieved no more effective result on the issue of seaworthiness.

## POINT II

**Was the petitioner denied due process by the District Court's charge to the jury which reviewed the evidence and presented it in practical conformity with the manner in which it had been heard by the jury?**

Petitioner improperly considers the District Court's refusal of the testimony on a quantitative rather than qualitative basis. It should be emphasized that petitioner presented only one witness, so that the testimony adduced on its behalf was far less than that of respondent and consisted primarily of pure denials. The same kind of allegation of unfairness was rejected in *Jamison v. Hawkins*, 13 Pa. Superior Ct. 372, 375 (1900), where the Court said that the testimony of the plaintiff was "a little more fully stated, because the facts relating to the case were therein detailed at greater length for the reason that the burden of making out a case rested upon the plaintiff."

As a matter of fact, the District Court made considerably more reference to the petitioner's contentions than the petitioner has stated to your Honorable Court. These specific references are to be found on Pages 217a and 226a of the Appendix for the use of the Circuit Court of Appeals.

It is equally important to note that the petitioner has improperly emphasized the treatment which the District Court gave to the respondent's evidence in stating that the District Court devoted ten pages to such evidence. The only particular references to the contentions of respondent comprises approximately one page set forth on portions of Pages 225a and 226a of the Appendix for the use of the Circuit Court of Appeals.

A review of the entire charge of the District Court is convincing as to its fairness in submitting the issues and facts to the jury. It is also important to consider that the District Court admonished the jury that it need not accept its review of the facts as conclusive (Appendix for the use of the Circuit Court of Appeals, 227a) and reiterated this admonition to the jury after petitioner's exceptions to the charge (Appendix for the use of the Circuit Court of Appeals, 242a).

## Conclusion.

The trial of this action was conducted by the District Court in a most fair and impartial manner, particularly in view of the repeated efforts of counsel for petitioner to depart from established procedures as prescribed by the local Rules. Clearly, the District Court and the Circuit Court of Appeals gave exhaustive consideration to the points and arguments raised before your Honorable Court, as well as many other arguments which were raised by petitioner and are now apparently abandoned. In the sound

exercise of judicial discretion, the District Court and the Circuit Court of Appeals have not deemed it proper to disturb this judgment in any manner. The petitioner has not been denied any right which would have been available to the petitioner on the basis of the procedure which it chose to follow, and respondent respectfully submits that the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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**Certificate of Service.**

I certify that I have served five copies of the foregoing brief on Martin E. Geary, attorney for the petitioner, personally.

LLOYD F. ENGLE, JR.,
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